IN THE HIGH COURT OF BOMBAY AT PANAJI

CRIMINAL APPEAL NO. 33 OF 2005

Sanjay Shreshta
s/o. Of Dhankumar Shreshta
R/o. Khani Menjang Basti,
Ward no.6, Gabase Batas
Anchel Mechi, District Illan,
East Nepal. ..... Appellant/Accused

V e r s u s

S T A T E ..... Respondent/Complainant

Mr. T. George John, Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the State.

CORAM: N. A. BRITTO, J.

DATE: 15th December, 2006.

ORAL JUDGMENT

The accused is before this Court impugning the conviction and sentence imposed upon him under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Act, 1985, (Act, for short).

2. The accused was charged and tried with an allegation that on 17.04.2003, at 19.45 hours, behind Vagator Parish Youth Club House, at Ozrant, Vagator, he was found in illegal possession of 3.10 grams of charas on his person and 9.85 kgs in the shoulder bag carried by him, in all 10.16 kgs, without any

document.

3. As per the prosecution, the raid was conducted by PI Wilson D' Souza/Pw4 of Anjuna Police Station, after receipt of specific information that a person of stated description would be found near the said football ground. To support the charge, prosecution examined six witnesses including the panch witness Rebello/Pw3 and the analyst Shri Kaissarre/Pw1. Sushant Naik/Pw2, working in the office of the Superintendent of Police, did the work of dispatching of the sample. Pw6 did the work of keeping the sample in safe custody after it was handed over to him by PI D' Souza/Pw4, till it was sent to Sushant Naik/Pw2. The sample was analysed by Kaissarre/Pw1, who found that it contained charas.

4. The learned Special Judge after assessing the evidence of the witnesses produced by the Complainant, came to the conclusion that the accused was found in illegal possession of 10.16 kgs of charas without any authorisation. The learned Special Judge also found that the provisions of Section 50 of the Act were complied with. As far as the provisions of Section 42 of the Act are concerned, the learned Special Judge came to the conclusion that what would be applicable is Section 43 of the Act as the accused was found in a public place. The learned Special Judge, therefore, proceeded to convict and sentence the accused as aforesaid.

5. As stated by P.I. D' Souza/Pw4, when he was attached to Anjuna

Police Station on 17.04.2003, at about 17.00 hours, he had received a telephonic message that a person of stated description would come at Vagator, near football ground at Ozrant, to deliver consignment of charas between 6.00 to 6.30 p.m., which information he reduced to writing and sent a copy to DyS.P. D' Sa/Pw5, with a special messenger and then sent a Constable to secure the presence of two panchas, who came with Rebello/Pw3 and one Chandrakant, and in the meantime, he received instructions from Shri D' Sa/Pw5, in the form of a written note and thereafter he introduced the panchas to the members of the raiding party and at about 5.45 p.m., he proceeded in a police jeep with the seal of Anjuna Police Station and the kit box containing writing, packing, weighing, sealing, etc., materials and thereafter parked his jeep by the side of the road and at about 5.55 p.m., they alighted from the vehicle and walked towards the club house, where they saw the accused sitting and facing towards the sea and was having a shoulder bag on his back and since his description matched with the description he had received, they went and surrounded him and on seeing them, the accused asked in Hindi “kya hua, kya hua”, whereupon, he disclosed his identity and showed his identity card and then told him about the receipt of reliable information and upon name and other particulars being asked, the same were given to him by the accused and thereafter he took a search of the person of the accused and before taking the said search, he told the accused that he had a right to be searched before a Gazetted Officer or a Magistrate of his choice which offer the accused declined and he also made another offer to the accused to take the search of the raiding party, which offer the accused also declined and allowed his search to be

taken. According to D' Souza/Pw4, 3.10 grams were found in a rectangular shaped packet wrapped in a greenish colour adhesive tape in the right pocket of his pant and 9.85 kgs of charas were found in the shoulder bag, which were thereafter packed and sealed with 8 seals of Anjuna Police Station and when the accused asked whether he has any documents, he replied in the negative. Shri D' Souza/Pw4, also stated that on the right hand side pocket, he found a yellow colour purse, containing a railway ticket, a pocket notebook having the name of the accused, cash of Rs.700/-, which articles were packed and sealed. Shri D' Souza/Pw4 stated that since the quantity was large, he directed a Constable to bring a large weighing scale. He stated that the weighing and sealing was done personally by him while packing and stitching was done by Constable buckle no. 5060 under his direction while the panchanama was written by another Constable Buckle no. 3742 under his direction and with the help of the jeep and torch light. He stated that thereafter he returned with the seized articles and the accused to the Police Station and filed his complaint against the accused. He also stated that the seized articles in sealed conditions, were given to Head Constable Babu for safe custody which fact has been confirmed by Shivaji Shetgaonkar/Pw6, the writer HC of Anjuna Police Station.

6. The first submission made on behalf of the accused by learned Advocate Shri Geroge John is that there is no compliance of Section 50 of the Act. Learned Advocate contends that the accused, as stated by Shri D' Souza/Pw4, was speaking in Hindi but the offer to be searched before a Gazetted

Officer or a Magistrate was not made to the accused in a language known to him i.e. in Hindi. As far as this aspect is concerned, D' Souza/Pw4 has categorically stated that he had told the accused that he had a right to be searched before a Gazetted Officer or a Magistrate of his choice, which offer the accused declined. Shri Rebello/Pw3 has also stated that P.I. D' Souza/Pw4 had informed the accused that he had a right to be searched in front of a Magistrate or a Gazetted Officer, known to him in close vicinity. Both D' Souza/Pw4 and Shri Rebello/Pw3 have categorically stated that the conversation between the accused and Shri D' Souza/Pw4, took place in Hindi and this only shows that the offer which Shri D' Souza/Pw4 made to the accused that he could be searched either before a Magistrate or a Gazetted Officer, was made in Hindi language. There is no doubt that Shri Rebello/Pw3 has added his own words to the offer by stating that a offer was made to the accused that he could be searched before a Magistrate or a Gazetted Officer known to him in close vicinity. It is quite probable that the later words used by Shri Rebello/Pw3, must have been his own addition. There is nothing to doubt the evidence of both the witnesses namely Shri D' Souza/Pw4 and Shri Rebello/Pw3 that the accused was given the said option to be searched before a Magistrate or a Gazetted Officer. In this context, reference could be made to the case of ***Prabha Shankar Dubey v. State of M.P. (2003 AIR SCW 6592)***, wherein the Apex Court observed that there is no specific form prescribed or intended for conveying the information required to be given under Section 50 and what is necessary is that the accused should be made aware of the right to be searched in the presence of one of the officers named in the section itself. No

specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or strait/jacket formula. The same view is also held in ***Krishna Kanwar v. State of Rajasthan ((2004) 2 S.C.C. 608).*** Considering the facts stated by the aforesaid two witnesses, in my view, there has been compliance of Section 50 of the Act.

7. Next, it is submitted on behalf of the accused that Rebello/Pw3, is a stock panch witness. The evidence of Shri D' Souza/Pw4 and Shri Rebello/Pw3, does not show that he is a regular panch witness of the police. On the contrary, the cross examination of Shri Rebello/P.w.3 shows that he is a teacher by profession and had been a pancha in only one case unconnected with drugs and, therefore, it could not be said that he was not a independent witness. In fact, the evidence of Rebello/P.w.3 inspires confidence and since he is a independent witness, he has substantially corroborated the version given by D' Souza/P.w.4.

8. Next, it is submitted on behalf of the accused that accused knew only hindi and the panchanama was not explained to him in that language. In fact, there is no cross examination or foundation in cross examination on that aspect. It is true that the panchanama-exhibit 26 shows that it was explained to the panchas in Konkanni and was found to have been correctly recorded by them. If at all the accused has signed the panchanama-exhibit 26, it is only as a token of

having received a copy of the same. The fact that the conversation between the accused and Shri D' Souza/Pw4, took place in Hindi has been recorded in the panchanama. Reliance has also been placed on a decision of this Court in the case of ***Hassan Imam Inamdar v. State of Maharashtra (2004 (Supp.) Bombay C.R. 344)***, contending that the panchanama ought to have been written in Hindi, a language which was known to the accused. As far as this aspect is concerned, Shri D' Souza/P.w.4 has stated that he can write Hindi to some extent. In my view, the observations made in the case of ***Hassan I. Inamdar v. State of Maharashtra*** (supra) are not at all applicable to the facts of the case at hand. It is nobody's case that Shri D' Souza/P.w.4 was conversant in writing a panchanama in Hindi for him to have recorded the panchanama in that language. As stated by this Court in ***Susai Raju v. State***, (unreported decision dated 07.10.2006 in Criminal Appeal No. 16/2005), although the official language of the State is Konkanni, hardly any Police Officer draws a panchanama in that language and as a matter of practice, panchanamas are recorded in the language in which the concerned officer is more familiar. Drawing a panchanama in a language the accused was not familiar with cannot be used either to reject the panchanama or the evidence given in support thereof or to doubt the case of the prosecution.

9. Another submission made is that the scale used by Shri D' Souza/P.w.4, was not calibrated and Shri D' Souza/P.w.4, having been given an opportunity to produce the Calibration Certificate, did not produce the same. In case the said scale used by Shri D' Souza/Pw 4 was supplied by his own

department, one fails to understand as to how he could be in possession of the Calibration Certificate of such a scale. It is but natural that the Department would supply to its officers scales which are calibrated. Nothing turns out in favour of the accused on this aspect of the case as well. It is also submitted on behalf of the accused that the notings on the seized articles were made in English/Roman and not in Hindi, a language understood by the accused. Regarding this aspect, there is absolutely no cross examination and even otherwise only because P.I. D' Souza/Pw 4 wrote the particulars of the seized articles in English language, could not have resulted in any prejudice being caused to the accused.

10. The learned Special Judge, Mapusa, after considering the evidence produced, had rightly convicted and sentenced the accused.

11. There is no merit in this appeal. Consequently, the same is hereby dismissed.

N. A. BRITTO, J.

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